

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER RULING
DECISION NO. 141 AS A PRECEDENT
DECISION PURSUANT TO SECTION
409 OF THE UNEMPLOYMENT
INSURANCE CODE.

In the Matter of:

HOFBRAU, INC.
(Employer-Appellant)

PRECEDENT
RULING DECISION
No. P-R-338

FORMERLY
RULING DECISION
NO. 141

Employer Account No.

Claimant: Yee Ping Fong
S.S.A. No.
BYB: 10203 SD: 09283

The employer appealed from Referee's Decision No. OAK-R-5976 which held that the employer's reserve account was chargeable with three times the claimant's weekly benefit amount, or \$165, under section 1030.5 of the Unemployment Insurance Code. The employer has submitted written argument.

STATEMENT OF FACTS

The claimant had worked for the employer herein intermittently for a number of years. He last worked on September 28, 1963 as a bus boy. He called his supervisor and suggested that a replacement be obtained since he was not returning to work. Although the claimant was ill, he did not mention this nor did he request a leave of absence.

Effective October 20, 1963, the claimant filed a claim for benefits indicating on the claim form that he had been laid off for lack of work. He was determined to be entitled to a weekly benefit amount of \$55 if otherwise eligible. On November 2, 1963, the department mailed a copy of the claim form to the employer. On November 8, 1963, the employer's agent responded, stating that the claimant had voluntarily "quit his job to attend school." In view of the conflict between the claimant's statement and that

of the employer, the department investigated the matter by interviewing the claimant, calling his physician, and calling his immediate supervisor. The department then disqualified the claimant for benefits under sections 1256, 1257(a) and 1260 of the code. The record is not clear whether the department issued a ruling under sections 1030 and 1032 of the code.

On November 19, 1963, the department mailed to the agent herein a Notice of Potential Charge to Reserve Account in relation to this employer. The notice contained the following:

"In your request for ruling and/or determination regarding the termination of the above-named claimant from your employment you stated: Claimant 'quit his job to attend school.'

"However, the following information received by the Department indicates either that the above information submitted by you is untrue or that you failed to include a material fact in your communication: the claimant called his employer and told him to get a replacement as he was not going to come to work (due to illness). Claimant states he made no mention of school and is not attending, or planning to attend any school.

"Careful consideration of available facts leads to the conclusion that your communication contained a wilful false statement or that you or your employee, officer, or agent wilfully failed to report a material fact concerning the termination of employment.

"If you wish to submit an explanation or present evidence that you did not make a false statement or withhold a material fact, please write or visit the local office shown below within 10 days from this notice.

"If you do not reply within the 10-day limit, a determination will be made from the available facts under Section 1030.5 of the California Unemployment Insurance Code. Section 1030.5 provides for charging an employer's reserve account with not less than two nor more than ten times the claimant's weekly benefit amount when it is found that he or his employee, officer, or agent wilfully made a false statement or withheld a material fact concerning the termination of a claimant's employment."

The following testimony was given in regard to what the agent and the employer did following the agent's receipt of the notice of potential charge on November 20, 1963.

"Q All right. Now what did you do?
A (by agent) I think I called Mr. Leon (President of the employer) and asked him if he made a false statement in the facts that he gave our office.

"Q What did he say? A He said he did not.

* * *

"Q Well did you make an investigation before you responded on December 3, any investigation at all? A I called Mr. Leon.

"Q Do you know you did, or do you think you did? You told me you thought you did.
A Well - - - - . I don't remember whether I sent it to him, or whether I talked to him on the telephone.

"Q Do you remember, Mr. Leon? A (LEON) Honestly, no.

"Q You don't remember what happened?
A No. I remember getting correspondence on it. I don't remember a phone call.

"Q When did you find out about this confusion? A Well the actual confusion, the first I heard about it is when - - when I got a notice that there'd been some penalth (sic) because we made a mistatement. Then I got concerned about it.

"Q Then you investigated it? A And did some checking on it. Which wasn't too long ago.

"Q Did you talk to the bookkeeper?
A Talked to the Bookkeeper and talked to Mr. Chan.

"Q I see. But is that the first time - -
A The first time I ever knew there was anything wrong about it.

"Q But I mean that's the first time you made any investigation? A That's right. I had no reason before."

On December 3, 1963 the employer's agent made the following reply to the notice of potential charge:

"This will acknowledge receipt of your form DE 3802, Notice of Potential Charge to Reserve Account, dated November 19, 1963.

"We protest any charge for false statements under Code Section 1030.5, irrespective of the claimant's statements, that the employer states the claimant quit to attend school, as reported.

"Notice of your findings will be appreciated."

This reply was received by the department on December 4, 1963, after it had issued and mailed the Notice of Determination on Charge to Reserve Account from which the appeal herein was taken.

Initially, the erroneous report to the department resulted from these circumstances: The employer employed about 30 kitchen workers and bus boys in its establishment. Most of them were Chinese. On the day the claimant called his supervisor to report he would not return to work, two other employees left their work. One of these was also Chinese and he left to attend school. The supervisor testified that he reported to the employer's bookkeeper that the three men had quit and the circumstances under which they quit. The president of the employer-corporation testified that the bookkeeper prepared the reports concerning the termination of the employment of these three men for his signature, that he accepted the reports without question, that he signed them, and that he forwarded them to the agent for submission to the department. The bookkeeper, who was not present at the hearing, allegedly confused the two Chinese workers and their reasons for leaving work and prepared an erroneous report as to the claimant.

REASONS FOR DECISION

Section 1030.5 of the Unemployment Insurance Code provides:

"If the director finds that any employer or any employee, officer, or agent of any employer, in submitting facts pursuant to Section 1030 or 3701, willfully makes a false statement or representation or willfully fails to report a material fact concerning the termination of a claimant's employment, the director shall make a determination thereon charging the employer's reserve account not less than 2 nor more than 10 times the weekly benefit amount of such claimant. The director shall give notice to the employer of a determination under this section. Appeals may be taken from said determinations in the same manner as appeals from determinations on benefit claims."

Section 1257 of the code provides in pertinent part:

"An individual is also disqualified for unemployment compensation benefits if:

"(a) He wilfully made a false statement or representation or wilfully failed to report a material fact to obtain any unemployment compensation benefits under this division."

In Benefit Decision No. 6746 [now Appeals Board Decision No. P-B-216] we held that the word "Willfully" in code section 1030.5 has the same meaning as the same word in code section 1257(a).

In Benefit Decision No. 5730 and others, we have adopted the following definitions of the term "wilful."

"To do a thing with deliberation is to do it after consideration and reflection, and if after indulging in this mental process, the act is done as a result thereof, it is wilful." People v. Sheldon (1886) 68 Cal. 434, 9 Pac. 457."

"'To do a thing wilfully is to do it knowingly.' People v. Calvert (1928) 93 Cal. App. 568, 269 Pac. 969."

"'Conscious; knowing; done with stubborn purpose but not with malice.' Helme v. Great Western Milling Co. 43 Cal. App. 416, 185 Pac. 510, 512."

We have held that a claimant is not subject to disqualification under section 1257(a) of the code where he fails to reveal complete information because of a simple error (Benefit Decisions Nos. 5904 and 6387).

The evidence of record in this case indicates that the agent's statement of November 8, 1963 resulted from a simple error by the bookkeeper. The bookkeeper apparently confused the claimant with the other Chinese worker who left work on the same day. When he prepared his erroneous report there was no occasion for consideration and reflection; it was not done with conscious or stubborn purpose. The employer's president and the agent were not aware that the report was erroneous when they performed their part in the chain of circumstances which resulted in the submission of false information to the department initially. Therefore, we could validly conclude that wilfullness, within the meaning of section 1030.5 of the code, was not present at this point.

However, we are concerned with the effect of the events which took place after the agent received the notice of potential charge dated November 19, 1963. Therein, the agent was advised of the conflict in the information submitted to the department; therein, the department gave the agent and employer ten days within which to investigate and to submit the correct information. The agent made only a minimal attempt to investigate by contacting the employer's president who could not even recall such attempt. We think that, at that time, the agent and the employer's president could have made a thorough investigation in an attempt to ascertain the truth and submit it to the department within the time granted.

Instead of using the opportunity given by the notice of potential charge to correct the earlier false statement, the agent, in the untimely letter of December 3, 1963, reiterated, in effect, the same false statement. This series of acts and omissions amounted to a willful false representation and willful withholding of material facts within the meaning of section 1030.5 of the code.

Whether the employer or its employees or its agent intended to defraud the claimant by inducing the department to disqualify him for benefits or to defraud the benefit fund by obtaining a favorable ruling is not material (Benefit Decision No. 6746 [now Appeals Board Decision No. P-B-216]).

DECISION

The decision of the referee is affirmed. The employer's reserve account is charged in the amount of \$165.

Sacramento, California, May 8, 1964.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

GERALD F. MAHER, Chairman

LOWELL NELSON

NORMAN J. GATZERT

Pursuant to section 409 of the Unemployment Insurance Code, the above Ruling Decision No. 141 is hereby designated as Precedent Decision No. P-R-338.

Sacramento, California, May 3, 1977.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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